



ARKANSAS JUDICIARY

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Rule 43. Taking Of Testimony.

- (a) Form. In all trials, the testimony of witnesses shall be taken in open court, unless otherwise provided by these rules or as otherwise provided by law. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.
- (b) Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.
- (c) Evidence on Motions. When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, or the court may direct that the matter be heard wholly or partly on oral testimony or deposition.
- (d) Interpreters. The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

Reporter's Notes to Rule 43: - 1. Prior to the 1975 amendments, FRCP 43 was entitled "Evidence" and provided the basic rule of evidence in civil cases in federal courts. The adoption of the Federal Rules of Evidence abrogated much of FRCP 43; hence its substantial revision in 1975. By enacting Act 723 of 1976, the Arkansas Legislature adopted the Uniform Rules of Evidence which are identical to the Federal Rules of Evidence insofar as the mode and order of interrogation and presentation of testimony are concerned. Hence, Rule 43 is identical to FRCP 43.

2. Sections (b) and (c) do not work any changes in Arkansas procedure. Superseded Ark. Stat. Ann. 28-201 (Repl. 1962) permitted the use of affidavits upon motions although inherent in that statute was the right of the trial court to require oral or deposition testimony in lieu of affidavits.

3. Section (d) is identical to FRCP 43(f) and provides for the permissive appointment of an interpreter and the payment of his compensation. Rule 604 of the Uniform Rules of Evidence touches upon the use of interpreters and requires that he be subject to the provisions of the Uniform Rules concerning qualifications as an expert and the administration of an oath or affirmation that he will make a true translation.

Addition to Reporter's Notes, 2005 Amendments: - Rule 43(a) has been amended in two ways. Continuing the substantial identity between the Arkansas Rule and FRCP 43, both of these changes mirror 1996 revisions of the Federal Rule. First, the requirement that testimony be taken "orally" has been eliminated. The amendment allows testimony through non-verbal means (i.e., writing, sign language, or computer) from a witness who is unable to speak.

Second, a new provision has been added. That provision gives the circuit court discretion to allow testimony in open court from a different location by contemporaneous transmission. Two important requirements must inform that discretion: good cause shown in compelling circumstances and appropriate safeguards.

Because our legal tradition strongly prefers testimony in the fact-finder's presence, the inconvenience to a witness of attending trial will not establish good cause or compelling circumstances. The amended Rule contemplates some unexpected event that makes attendance by the witness very difficult. Examples of such events include an accident, an illness, or the need for an emergency hearing. When the witness's absence can be reasonably anticipated, a deposition should be the preferred method of securing the testimony. See generally, Advisory Committee's Note, 1996 Amendment to FRCP 43(a).

The amended Rule also requires the circuit court to adopt appropriate safeguards when it allows testimony by contemporaneous transmission. Those safeguards should ensure accurate identification of the witness, protect against influence by persons present with the witness, and secure accurate transmission of the testimony.

History Text:

History. Amended February 10, 2005

Associated Court Rules:

Rules of Civil Procedure

Group Title:

VI. Trials

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